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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Amendment of the Commission's)
Rules to Preempt State and Local)
Regulation of Tower Siting for)
Commercial Mobile Services Providers)

RM-8577

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

On December 22, 1994, the Cellular Telecommunications Industry Association ("CTIA") filed a Petition for Rulemaking with the Federal Communications Commission (the "Commission" or "FCC") requesting preemption of state and local zoning regulation to the extent such regulation impedes the entry of Commercial Mobile Radio Services ("CMRS") providers into the mobile communications marketplace.^{1/} Nextel Communications, Inc. ("Nextel") hereby submits its comments in response to CTIA's submission. Nextel supports the objectives of CTIA's Petition and urges the Commission to initiate a rulemaking examining the issues raised therein.

I. INTRODUCTION

In its Petition for Rulemaking, CTIA requests preemption of tower site regulation at the state and local level to advance the development of a competitive, efficient mobile services infrastructure. Specifically, CTIA states that unless CMRS providers are freed from disparate and burdensome state and local siting regulation, the Commission's vision of an

^{1/} See Cellular Telecommunications Industry Association's Petition for Rulemaking (filed December 22, 1994) (hereafter "CTIA Petition").

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"ubiquitous, competitive, efficient and federally-regulated" CMRS infrastructure will not be realized.^{2/} Accordingly, CTIA requests preemption of any state or local tower siting regulation that directly or indirectly impedes the mobile market entry of CMRS providers, pursuant to Sections 332 and 2(b) of the Communications Act.^{3/}

Nextel believes that the issues raised in CTIA's Petition are important to the development of mobile competition and should be addressed in a formal proceeding. As emerging CMRS providers are licensed and begin to construct their systems, the ability to locate and build towers will be critical in successfully competing with entrenched mobile services providers. Unless the Commission examines its options for preventing discriminatory zoning regulation from blocking new service coverage, the Commission's efforts to create a competitive mobile services marketplace will be impeded, and the benefits of competition to the public will be lost.

II. THE COMMISSION MUST ENSURE THAT ITS EFFORTS TO ESTABLISH A COMPETITIVE CMRS MARKETPLACE ARE NOT UNDERMINED BY RESTRICTIVE STATE AND LOCAL SITING REGULATION.

To ensure that the competitive goals of the Omnibus Budget Reconciliation Act of 1993 are achieved, an appropriate level of federal policy supervision of zoning regulation is

2/ See CTIA Petition at p. 2.

3/ Although CTIA's Petition references tower siting regulation, the Commission should interpret the Petition as including all CMRS antenna siting, whether on a tower, a building, a monopole, etc.

desirable and necessary. Congressional and Commission efforts to create a pro-competitive and uniform regulatory environment for the development of CMRS are well established. As noted by CTIA, in amending the Communications Act in 1993, Congress preempted state regulation of CMRS entry and rates, reserving to local jurisdictions the limited ability to regulate "other terms and conditions" of CMRS service.^{4/} In its implementation of this new CMRS statutory scheme, the Commission initiated numerous proceedings to balance the regulatory burdens imposed on all CMRS providers such that "like" services are subject to similar regulation.^{5/} Overly burdensome and restrictive state and local regulation of tower siting and zoning will only frustrate efforts to provide a regulatory environment that promotes communications diversity and choice.

The impact of arbitrary site regulation on the entry of emerging CMRS providers cannot be underestimated. Nextel has experienced first-hand the unfair effects of siting regulation that effectively bars entry into new markets or creates potentially serious "holes" in service coverage. In certain areas of the country, for example, local authorities have placed a moratorium on tower construction. In others, the delays attending requests for authority to install and operate "cell"

4/ See Omnibus Budget Reconciliation Act of 1993, Section 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A) (1993).

5/ See e.g. Notice of Proposed Rulemaking, 8 FCC Rcd 7988 (1993); Further Notice of Proposed Rulemaking, 9 FCC Rcd 2863 (1994).

sites make it difficult to provide service efficiently in a mobile marketplace in which minimizing the time to market is critical to future success.^{6/} The Commission should solicit information on various types of siting and zoning regulations in a rulemaking that focuses on regulatory alternatives that address both national and local concerns.

III. THE COMMISSION SHOULD ADOPT POLICIES AND PROCEDURES THAT ENCOURAGE STATES AND LOCALITIES TO PERMIT THE ENTRY OF NEW CMRS PROVIDERS WITHOUT IGNORING LEGITIMATE LOCAL CONCERNS.

The states have a recognized interest in preserving the safety of the public as well as the aesthetics of their communities. Zoning and siting regulation traditionally has been reserved to the states as raising primarily "local" concerns. Nevertheless, federal siting guidelines and safeguards are necessary to prevent unjustified or overly restrictive state and local zoning and site regulation from precluding the development of CMRS competition.

Preemption of state and local regulation should only occur as a last resort where local policies frustrate the achievement of Congressional and FCC competitive goals for CMRS. It is critical that the Commission preserve the flexibility and regional involvement that local siting regulation affords, but at

^{6/} Nextel's service implementation has been impeded in jurisdictions where moratoriums have been established on the installation and/or operation of cell sites, e.g. Mamaroneck, New York. In other jurisdictions, Nextel is contending with the excessive costs and even more excessive delays of lengthy appeal processes where access to specific sites has been denied, e.g. Richfield Township, Ohio.

the same time take action, where justified, to overcome unreasonable local barriers to radio tower siting. The FCC could greatly assist this process by setting guidelines that ensure that state and local processes and procedures are responsive, and that the bases for denial are well founded and serve legitimate local and/or public interests.^{7/} A rulemaking exploring the FCC's procedural and policy options could promote cooperation between interested parties to achieve maximum benefit to the public. The Commission should work to create a set of policy guidelines that permit local and state processes and involvement, but that also address the realities of the marketplace and the competitive needs of emerging service providers. The Commission should consider state preemption only where there is an absolute blockage of CMRS build-out, with no right of appeal.

Of particular concern for emerging service providers are the various state-mandated RF-based site restrictions that unduly limit the ability of CMRS providers to expand their operations. Specifically, states and local jurisdictions should not be permitted to halt system deployment on the basis of RF safety concerns where the FCC and the industry have established safety guidelines directly addressing these issues. Removing RF safety issues from siting disputes would greatly assist emerging CMRS operators in their dealings with local zoning authorities.

7/ See e.g. 47 C.F.R. § 25.104 (providing for the preemption of local zoning of earth stations to the extent the regulation is "unreasonable" or not supported by "clearly defined health, safety or aesthetic objectives").

Questions regarding the appropriate and safe level of RF exposure for radio communications have been the focus of investigation for the industry, the FCC and other agencies of the federal government for some time.^{8/} The Commission's Rules, for instance, specifically incorporate safety standards in the regulation of CMRS providers, including PCS operators.^{9/} In addition, the Commission continues to amend and update its safety guidelines and methods of evaluation, as the market develops and the potential risks of RF exposure change through technological advancement.^{10/}

Because appropriate RF safety standards have already been developed and identified, states and localities should not be permitted to block CMRS entry when a proposed antenna site complies with the Commission's safety guidelines. Rigid or duplicative state RF-based regulation serves only to hinder the development of competition with no countervailing public benefit. CMRS providers should not be forced to prove that their systems

8/ See Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, Status of Research on the Safety of Cellular Telephones, United States General Accounting Office (November 1994). Moreover, cellular carriers and telephone manufacturers, under the auspices of CTIA, have committed themselves to a three to five year research agenda to conduct health science research on cellular telephones and other wireless communications instruments.

9/ The Commission's Rules specify the use of the American National Standard ANSI C95.1-1982, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" for evaluating the environmental impact of RF radiation. See 47 C.F.R. § 1.1301, et seq.

10/ See Notice of Proposed Rulemaking, 8 FCC Rcd 2849 (1993).

are "safe" each time they request permission from local authorities to establish a cell site or build a tower, provided that FCC RF exposure guidelines are satisfied.^{11/}

In cases where state and local determinations impede CMRS development by denying site access to a petitioning provider, the FCC should establish a process for hearing complaints and resolving disputes in an unbiased forum. States and localities should not be the final arbiter of site access when their determinations unnecessarily thwart the Congressional vision of a competitive mobile services marketplace.^{12/} Providing for an appeal process that extends certain due process guarantees to CMRS providers, where no further avenues for relief are provided at the state and local levels, appropriately reflects the local and national interest in the regulation of CMRS.^{13/}

^{11/} See Petition for Further Notice of Proposed Rulemaking filed by the Electromagnetic Energy Association seeking preemption of local RF radiation emission standards that are inconsistent with FCC-approved RF levels (ET Docket No. 93-62, filed December 22, 1994).

^{12/} See e.g. Satellite Communications, Inc., 95 FCC 2d 1223, 1232 (1983) (preempting state and local zoning regulation where local directives will "chill development" of the service or impede its growth).

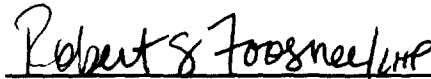
^{13/} In examining these issues in the context of a rulemaking proceeding, the Commission can explore various state siting processes to identify the due process procedures that result in fair, non-discriminatory and reasonable siting limitations and that recognize broader policy issues and concerns.

IV. CONCLUSION

General guidelines and procedures for resolution of siting and zoning issues are necessary to ensure that restrictive state and local regulation does not thwart the Commission's efforts to promote a competitive CMRS marketplace. Nextel urges the Commission to initiate a rulemaking in the near term to examine the issues raised in CTIA's Petition, and to establish siting guidelines and permitting processes that will appropriately balance federal, state and local concerns.

Respectfully submitted,

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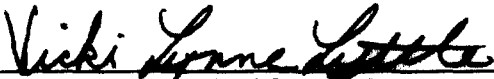
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February 17, 1995

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, hereby certify that on this 17th day of February, 1995, I caused a copy of the foregoing Comments of Nextel Communications, Inc. to be served by first-class mail, postage prepaid, to the following:

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